

FILED

January 11 2006

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

AMERICAN CAPITAL GROUP, LLC,

Plaintiff,

v.

FLATHEAD ELECTRIC COOPERATIVE, INC.,

Defendant.

PR06-0120

ORDER

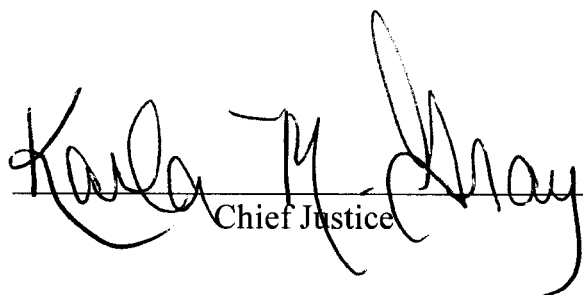
A motion for disqualification having been filed in Flathead County Cause No. DV-03-451(C),

IT IS ORDERED:

1. Pursuant to § 3-1-805, MCA, the Honorable John W. Whelan, District Judge, of the Second Judicial District, is hereby assigned to hear the disqualification proceeding.

2. The Clerk is directed to mail a true copy of this order to the Honorable Stewart E. Stadler, the Honorable John W. Whelan, and the Clerk of the District Court of Flathead County, Montana, for notification to counsel of record in Flathead County Cause No. DV-03-451(C).

DATED this 11th day of January, 2006.


Chief Justice

FILED

JAN 11 2006

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA



PR06-0120

STATE OF MONTANA ELEVENTH JUDICIAL DISTRICT
FLATHEAD COUNTY
FLATHEAD COUNTY JUSTICE CENTER
920 SOUTH MAIN, KALISPELL, MONTANA 59901

District Court Judges

Ted O. Lympus
(406) 758-5906

Katherine R. Curtis
(406) 758-5906

Stewart E. Stadler
(406) 758-5906

Bonnie J. Olson
Court Administrator
(406) 758-5665

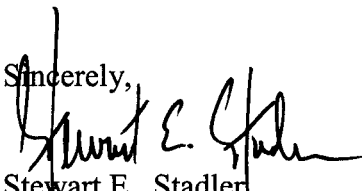
December 23, 2005

Montana Supreme Court
Attn: Chief Justice Karla Gray
Room 414 Justice Bldg
215 North Sanders
PO Box 203003
Helena MT 59620-3003

RE: American Capital Group, LLC v Flathead Electric Cooperative, Inc.
District Court Cause No. DV-03-451C

Dear Chief:

Defendant Flathead Electric Cooperative, Inc., filed a Request for Recusal, Alternative Motion to Disqualify Judge Stadler, Request for Referral to the Montana Supreme Court and Supporting Brief on December 19, 2005. Given the fact that I have been on this case for over two years I am not inclined to recuse myself. Accordingly, pursuant to Section 3-1-805, MCA, I am referring this matter to you for appropriate action.

Sincerely,

Stewart E. Stadler

c: Randy J. Cox, Esq.
Linda G. Hewitt, Esq.

1 WILLIAMS LAW FIRM, P.C.
2 SHELTON C. WILLIAMS, ESQ.
3 WILLIAM R. BIELER, ESQ.
4 235 E. PINE, P.O. BOX 9440
5 MISSOULA, MONTANA 59807-9440
6 Tel: (406) 721-4350 Fax: (406) 721-6037
7 *Attorneys for Defendant*

CLERK OF DISTRICT COURT

05 DEC 19 PM 12:27

FILED
BY _____
DEPUTY

6 **MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY**

7 AMERICAN CAPITAL GROUP, LLC,

8 Plaintiff,

9 -vs-

10 FLATHEAD ELECTRIC COOPERATIVE,
11 INC.,

12 Defendant.

Stewart E. Stadler
CAUSE NO. DV 03-451(C)

**DEFENDANT FLATHEAD ELECTRIC COOPERATIVE'S
REQUEST FOR RECUSAL, ALTERNATIVE MOTION
TO DISQUALIFY JUDGE STADLER, REQUEST FOR
REFERRAL TO THE MONTANA SUPREME COURT,
AND SUPPORTING BRIEF**

13 Defendant Flathead Electric Cooperative respectfully
14 requests Judge Stadler to recuse himself from this matter. In the
15 alternative, Defendant moves to disqualify Judge Stadler from
16 acting as judge in this matter based on his November 22, 2005
17 Order and supporting law. In the event Judge Stadler does not
18 voluntarily recuse himself, Defendant moves pursuant to M.C.A. §
19 3-1-805, that this issue be referred to the Montana Supreme Court
20 to allow the Chief Justice to assign an impartial district court
21 judge to hear the matter.

22 **BRIEF IN SUPPORT**

23 ~~This case involves a group of California real estate~~
24 investors known as American Capital Group or "ACG." ACG

188

1 represents that it and its affiliates own and operate projects
2 valued at \$499 million, with an equity of over \$167 million.
3 (Exhibit A, [ACG 7371-7372].) During the fiber optic boom, ACG
4 attempted to negotiate a deal with Flathead Electric Cooperative
5 to allow use of the co-op's easements and poles to string fiber
6 optic cable in the Flathead Valley. ACG's get-richer-quicker
7 scheme ultimately fizzled and ACG aborted the fiber optic plan
8 in May of 2002. Almost a year later, with a revised scheme to
9 make millions, ACG sued Flathead Electric alleging essentially
10 that Flathead Electric breached its agreement with ACG and cost
11 ACG millions of dollars. ACG is currently claiming damages of
12 more than Twenty-two Million Dollars (\$22,000,000.00). (April
13 15, 2005 demand letter attached as Exhibit B.)

14 District Court Judge Stewart Stadler has been presiding
15 over this case. Judge Stadler's November 22, 2005 Order which
16 changed venue, requires that he either recuse himself as the
17 judge or be disqualified. In the Order, Judge Stadler changed
18 venue from Flathead County because most potential jurors in that
19 county are members of Flathead Electric. FEC opposed this motion
20 and argued that members of a cooperative are not subject to per
21 se challenge. However, in his November 22, 2005 Order, Judge
22 Stadler ruled unequivocally that all members of Flathead
23 Electric are considered interested in the outcome of the
24 litigation; inherently partial; and subject to per se

1 disqualification. (Order, pp. 4-5, attached as Exhibit C). He
2 noted that bias does not need to be established for
3 disqualification of FEC members. Id. Although FEC disagrees
4 with Judge Stadler's reasoning and conclusion, nevertheless it
5 is clear from the Order that Judge Stadler is himself
6 disqualified from serving as a Judge in this case.

7 Judge Stadler is also a member of Flathead Electric
8 Cooperative. (Exhibit D, Affidavit of Shelton C. Williams and
9 accompanying Certificate of Counsel.) Based on his own Order,
10 Judge Stadler acknowledges that as both an owner and customer of
11 Flathead Electric Co-op, he is necessarily interested in the
12 outcome of the case; inherently partial; and subject to *per se*
13 disqualification. (See Exhibit C, November 22, 2005 Order, p. 4;
14 Exhibit D, Williams Affidavit, ¶¶ 4, 5.) This Court's Order
15 discussed the impartiality of co-op members at length. The Court
16 held:

17 The general rule is, just as a stockholder in a corporation is
18 disqualified from sitting as a juror in an action in which the
19 corporation is a party or in which it has a direct pecuniary interest,
20 so too is a member of a cooperative association disqualified from
21 serving as a juror in a lawsuit in which the association is involved.
22 The cases that have considered the issue and that have ruled that
23 a cooperative member is incompetent from serving on a jury have
24 described rural electric cooperative members as "**both owners and
customers** [of the electric cooperative] and at once take the place
of the stockholders and customers of privately owned utilities. . ."
Ozark Border Electric Cooperative v. Stacy, 348 S.W. 2d 586 (1961
Mo. App.) Further, the North Carolina Court held that ". . .
incompetency of the juror must be conceded, because the juror
was a member of the association and **necessarily interested in
the litigation.**" *Peanut Growers' Exch. Inc., v. Bobbitt* (1924), 188

1 N.C. 335, 124 S.E. 625. The courts have held that it was not
2 necessary to explore the remoteness of the co-op owner's interest,
3 and that the "... members of an electric cooperative ... were
4 subject to **per se disqualification** from serving as juror in the
5 action; an **inherent risk of impartiality** would arise from allowing
6 cooperative members to serve as jurors, since they had a
7 pecuniary interest in the action based on their status as both
8 owners and customers of the cooperative." *Alston v. Black River*
9 *Electric Co-op* (2001), 345 S.C. 323, 548 S.E. 858. (Court's
10 November 22, 2005 Order, p. 4, emphasis added.)

11 Judge Stadler goes on to hold:

12 The Court is satisfied, as stated earlier, that Montana should adopt
13 the position that, like stockholders of a corporation, members of an
14 electrical cooperative are automatically disqualified from being a
15 juror in a lawsuit involving the electric cooperative. Id.

16 Judge Stadler's reasons prohibiting stockholders of a
17 corporation or members of the co-op from acting as jurors, also
18 prohibit him, as a co-op member, from acting as the judge. The
19 Montana Supreme Court has for a long time recognized the
20 universal rule: "ownership of corporate stock by a judge
21 disqualifies him from acting in a case wherein the corporation
22 is interested." Gaer v. Bank of Baker, 107 P.2d 877 (Mont.
23 1940). Courts nationwide hold that a stockholder in a
24 corporation is disqualified to sit as judge in a trial wherein
25 the corporation is a party. 48 C.J.S. Judges § 80, p. 1051;
Templeton v. Giddings, Tex., 12 S.W. 851; King v. Sapp., 2
S.W.2d 573. Also, as a rule, a judge is disqualified from
sitting at the trial of an action against a mutual association
of which he is a member. City of Pasadena v. State ex rel. City
of Houston, 428 S.W.2d 388, 401 (Tex. 1968), citing Sovereign

1 Camp. Woodmen of the World v. Hale, 120 S.W. 539 (Tex. 1909);
2 New York Life Ins. Co. v. Sides, 101 S.W. 1163 (Tex. 1907). See
3 also Pahl v. Whitt, 304 S.W.2d 250, 252 (Tex. 1957). Judge
4 Stadler's Order sets forth his belief that members of a
5 cooperation **"qualify as impliedly biased."** The rule against
6 allowing judges to preside over cases in which they have an
7 interest is so strong that judges are even required to recuse
8 themselves when their family members own stock or are members of
9 the corporation being sued. In re Cement Antitrust Litigation,
10 688 F.2d 1297 (9th Cir. 1982), *aff'd* 459 U.S. 1191.

11 In addition to Montana and national case law requiring
12 disqualification, Montana statutes also require that Judge
13 Stadler recuse himself or be disqualified. M.C.A. § 3-1-803
14 requires disqualification of judges presiding over any action in
15 which he is *interested*. Further, the Canons of Judicial Ethics,
16 Rule 29, state that "A judge should abstain from performing or
17 taking part in any judicial act in which his personal interests
18 are involved." Judge Stadler himself acknowledges that a co-op
19 member is "a member of the association and necessarily
20 *interested in the litigation*." (Order, p. 4, citing Peanut
21 Growers' Exch. Inc., v. Bobbitt, 188 N.C. 335, 124 S.E. 625
22 (1924). These facts and law alone require Judge Stadler to
23 recuse himself or be disqualified.

24 M.C.A. § 3-1-805 requires disqualification of judges where

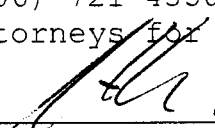
1 the judge has a personal bias or prejudice. Judge Stadler's
2 November 22, 2005 Order is prima facie evidence of his bias and
3 prejudice. In his Order, he concludes that all co-op members are
4 "necessarily interested in the litigation." Exhibit C, p. 4; See
5 also Affidavit of Shelton C. Williams, attached as Exhibit D. He
6 concludes that all co-op members have "an inherent risk of
7 impartiality" in resolving the case. As a co-op member, Judge
8 Stadler has the same interests and very same inherent risk of
9 impartiality that he has attributed to all the other co-op
10 members. Judges are not exempted from the rules of impartiality,
11 bias, and prejudice. In fact, judges and lawyers are held to a
12 higher standard. Under Rule 4 of the Canon of Judicial Ethics,
13 judges must avoid even the ***mere appearance of impropriety***. Given
14 Judge Stadler's Order that co-op members have an interest in
15 this litigation and would be inherently too impartial to be able
16 to judge this case, Judge Stadler remaining on this case would
17 create, at the very least, the appearance of impropriety.
18 Therefore, Defendant respectfully submits that Judge Stadler
19 should either recuse himself from the case or be disqualified.

20 Pursuant to the law set forth above and the Affidavit and
21 Certificate of Counsel attached as Exhibit D, Defendant
22 respectfully requests Judge Stadler to recuse himself. If he
23 does not, then pursuant to M.C.A. § 3-1-805(1), Defendant
24 respectfully requests this Court to proceed no further in the

1 cause and to refer the case to the Montana Supreme Court so that
2 the Chief Justice may assign an impartial district court judge
3 to hear the matter.

4 DATED this 16th day of DECEMBER, 2005.

5 WILLIAMS LAW FIRM, P.C.
6 235 E. Pine, P.O. Box 9440
7 Missoula, Montana 59807-9440
8 (406) 721-4350 fax 721-6037
9 Attorneys for Defendant

10 By 
11 Shelton C. Williams

12 **CERTIFICATE OF SERVICE**


13 I hereby certify that on the 16th day of December, 2005, a
14 copy of the foregoing was served upon the following by Mail,
15 Express Mail, Hand-Delivery, Fax, or Federal Express:

16 RANDY J. COX, ESQ.
17 SCOTT M. STEARNS, ESQ.
18 BOONE KARLBERG, P.C.
19 201 WEST MAIN, SUITE 301
20 P. O. BOX 9199
21 MISSOULA, MONTANA 59807
22 (406) 543-6646 fax: (406) 549-6804
23 *Attorney for Plaintiff*

[X] U.S. MAIL
[] EXPRESS MAIL
[] HAND-DELIVERY
[] FAX
[] FEDERAL EXPRESS

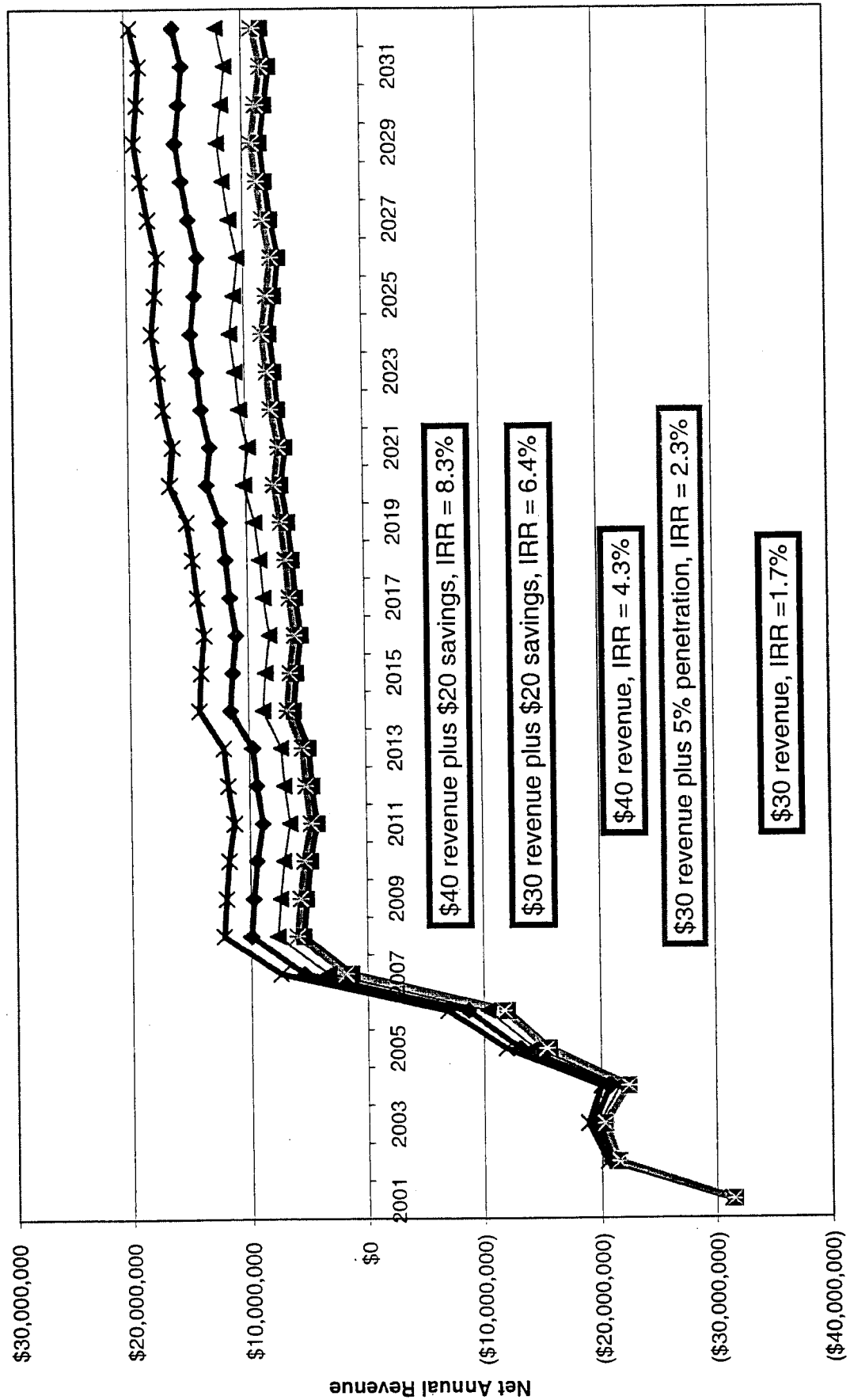
24 LINDA G. HEWITT, ESQ.
25 HAMMER, HEWITT & SANDLER, PLLC
100 FINANCIAL DRIVE SUITE 100
P.O. BOX 7310
KALISPELL, MT 59904-0319
(406) 755-4435 fax: (406) 755-5155
Attorney for Defendant Flathead Electric Co-op

[X] U.S. MAIL
[] EXPRESS MAIL
[] HAND-DELIVERY
[] FAX
[] FEDERAL EXPRESS


Gwen Berard, Secretary

A

Fiber Business Plan



Fiber Business Plan

Assumptions:

Capital Costs

Fixed Hub Construction Costs
Incremental Construction Costs Per Customer Connected
Replacement Gateways
Replacement Hub Elect.

	2001	2002	2003	2004	2005	2006	2007
	\$825,000	\$725,000	\$500,000	\$400,000	\$300,000	\$250,000	\$250,000
	\$	1,750	\$	1,250	\$	750	\$750
\$	400	Starts in 2006 on 25% of installations made 5 years earlier					
\$	30,000	Starts in 2006 on 25% of installations made 5 years earlier					

Operating Costs

Connection Related Operating Costs During Construction
Fiber Customer Care
Fiber Core

\$ 95,550

Total

Ongoing Operating Costs
Fiber Customer Care

\$ 441,000
2001-2006 2007-2025
\$ 587,265 \$ 352,800

Fiber Core
Total

\$ 309,307 50% after construction

Electronics Shop (4 FTE)

\$ 500,000 50% after construction

Consulting

\$2.00 per customer per month

NoaNet Costs

NOC Costs to Zipp®

Includes total costs and total revenues from NOC Business Plan

Miscellaneous (Travel, Equipment, etc)

\$ 300,000

Market Statistics

Hubs Constructed
Homes Passed
Cumulative Homes Passed
Market Penetration %
Number of Customers (Year End)
Customers Added During Year
Average Customers During Year

	2001	2002	2003	2004	2005	2006	2007	2008
	25	25	35	50	50	50	13	
	5,299	3,460	4,445	6,350	6,350	6,350	1,651	
	5,299	8,759	13,204	19,554	25,904	32,254	33,905	
	25%	40%	45%	50%	50%	50%	50%	
	1,325	3,504	5,942	9,777	12,952	16,127	16,953	
	1,325	2,179	2,438	3,835	3,175	3,175	826	
	663	2,415	4,723	7,860	11,365	14,540	16,540	

2008-2013 2014-2019 2020-2025
55% 60% 65%

Post Construction Penetration

Customer Growth

1.4% customer growth per year

Revenue

Revenue Per Customer Per Month
Upstream Access Revenue Per Customer Per Month
Dark Fiber Revenue (Annual)

\$ 30
\$ 2
\$ 3
\$ 500,000

B

W.T. BOONE (1910-1984)
KARL R. KARLBERG (1923-1988)
JAMES J. BENN (1944-1992)
THOMAS H. BOONE
WILLIAM L. CROWLEY
RANDY J. COX
ROBERT J. SULLIVAN
DEAN A. STENSLAND

LAW OFFICES
201 WEST MAIN, SUITE 300
P.O. BOX 9199
MISSOULA, MONTANA 59807-9199
TELEPHONE 406-543-6646
FAX 406-549-6804
www.boonekarlberg.com

CYNTHIA K. THIEL
ROSS D. TILLMAN
JAMES A. BOWDITCH
NATASHA PRINZING JONES
CORY R. LAIRD
MATTHEW B. HAYHURST
SCOTT M. STEARNS
THOMAS J. LEONARD

April 15, 2005

FEC Board of Trustees
c/o Shelton C. Williams - **VIA HAND DELIVERY**

John P. Connor, CPCU
Assistant Vice President
Senior Claims Attorney
Federated Rural Electric Insurance Exchange
PO Box 15147
Lenexa, KS 66285-5147

RE: American Capital Group, LLC vs. Flathead Electric Cooperative, Inc.
Claim No.: 25 DOM 100859
Insured: Flathead Electric Cooperative, Inc.
Claimant: American Capital Group, LLC

To Whom It May Concern:

Pursuant to the instructions set forth in Linda Hewitt's September 20, 2004 correspondence, American Capital Group, LLC ("ACG") submits the following demand.

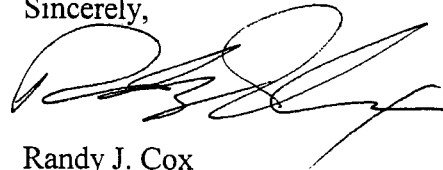
ACG's expert witness, Greg Mann of Gorham, Gold, Greenwich & Associates, opined in his expert report (previously provided) that "the fair market value of NWLW's assets and business customers is between \$27,060,354 - 39,410,170." Mr. Mann's opinion is based on what acquiring entities - including Bresnan Communications, the entity that has fiber hanging on FEC's poles - have paid in similar circumstances. Based upon this actual sales data, ACG calculates its demand as follows: \$19,705,085 (ACG's half of \$39,410,170), \$250,000 for time and money spent on the business plan, \$200,000 on attorneys' fees, and \$125,000 on costs and

April 15, 2005
Page 2

expenses incurred in this litigation, for a sub-total of \$ 20,280,085. With pre-judgment interest in the amount of \$2,028,008.50, ACG demands \$22,308,093.50.¹

Given this demand, and the serious exposure presented by this case, if FEC and Federated are not prepared to discuss the settlement of this matter at the mediation currently set for May 13, 2005, I suggest we postpone the mediation until after the Hon. Judge Stewart E. Stadler has ruled on the motions for summary judgment and other pending motions, which ✓
presumably will occur sometime in the wake of the June 8, 2005 hearing.

Sincerely,



Randy J. Cox

RJC/slg

¹ACG specifically reserves the right to request all damages it is legally entitled to request at trial, including punitive damages. For purposes of this demand, ACG merely sets forth the foundation of the damages it would request at a trial of this matter.

c

Stewart E. Stadler, District Judge
Department No. 3
Flathead County Justice Center
920 South Main Street
Kalispell, Montana 59901
(406) 758-5906

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

* * * * *

Defendant.

ORDER AND RATIONALE
ON MOTION TO CHANGE
VENUE

* * * * *

This matter is before the Court on Plaintiff's Motion to Change Venue; Defendant FEC objects, and the parties have fully briefed the matter. No party requested a hearing nor does one appear necessary. Therefore, the Court, having considered the motion, the briefs in support of and in opposition along with pertinent affidavits, and it thus being fully advised, now enters the following:

ORDER

Plaintiff's Motion to Change Venue is Granted; counsel are requested to submit to the Court within 10 days their recommendations to address this matter.

RATIONALE

Plaintiff filed its "ongoing" Motion for Change of Venue, arguing that members of the electric cooperative are deemed incompetent to serve on the jury panel. FEC contends the motion is untimely, barred by *res judicata*, is contrary to an agreed upon provision of the Agreement, and unsupportable. For the following reasons, the Court adopts the rule of law offered by Plaintiff and rejects the objections of Defendant.

1. Motion to Change Venue

Plaintiff filed this case in 11th Judicial District Court, Flathead County, after the case was dismissed from federal district court for Montana. Plaintiff now seeks to either change the place of trial or in some other manner proceed to trial with a jury pool that is not made up, almost exclusively, of members of FEC.

1 Plaintiff relies on *Mannix v. Butte Water* (1993), 259 Mont. 79, 854 P.2d 834, and 69 ALR 3rd
2 1296, for its argument that potential jurors in Flathead County will almost universally be members of
3 the Flathead Electric Cooperative, and therefore are *per se* incompetent to sit on this case, where a
favorable verdict in favor of ACG will impact FEC financially.

4 II. FEC's Objection

5 FEC raises a number of objections to the Motion to Change Venue, none of which are
6 persuasive.

7 1. *Res Judicata*

8 First, it argues that ACG's objection is barred by *res judicata*, as Federal Magistrate Leif B.
9 Erickson held the forum selection clause enforceable. ACG first filed this action with the Federal
10 District Court of Montana; in response to FEC's motion to dismiss the federal court action on the
11 grounds that the Agreement had an enforceable forum selection provision that mandated that the
lawsuit be brought in the District Court for the State of Montana, Judge Erickson granted the motion
without prejudice. (Ex. B to Defendant's Response to Motion to Change Venue, Doc. #128.)

12 At first blush, Judge Erickson's order appears to lend support to FEC's position. However, the
13 issue before the federal court, and on which Judge Erickson ruled, was whether the lawsuit should be
14 brought in federal district court or state court. While Judge Erickson referred to the Agreement and its
15 forum selection clause, it was in the context of whether the Operating Agreement (which had no forum
16 selection clause) was the only document applicable to the business relationship between the parties. The
17 Court determined that use of the operative word "exclusive" or "exclusivity" in the Agreement tied the
18 Agreement to the lawsuit which was premised on exclusivity. In addressing enforceability of the forum
selection clause of the Agreement, Judge Erickson compared the facts and Agreement herein to
Dockside, Ltd., v. Sea Tech, Ltd., 875 F.2d 762, (9th Cir.1989), in which a forum selection clause
provided that exclusive venue was in state court rather than federal court. The *Dockside* court considered
dispositive the "critical language" in the contract provision which indicated that the parties intended to
make venue exclusive to the state court in Virginia. Judge Erickson opined that the forum selection clause
in the Agreement contained equally "critical language" mandating state court, rather than federal court,
as the exclusive forum for adjudication of this litigation.

19 Certain factors mitigate against applying any principles of *res judicata* to the issue now under
20 consideration. In arguing the issue of the forum selection clause to Judge Erickson, ACG referenced *M/S*
Bremen v. Zapata Off-Shore Co., 407 U.S. 1, (1972), in which the U.S. Supreme Court upheld forum
21 selection clauses, but with the caveat that such clauses would not be upheld if "...enforcement would be
22 unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."
(Citations omitted.) Further, the *Bremen* Court stated "[a] contractual choice-of-forum clause should be
23 held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is
brought, whether declared by statute or by judicial decision."

24 As part of ACG's basis for seeking a different jury pool, it argues that the potential jury panel would,
25 according to a FEC representative's report, be made up of residents the vast majority of whom receive
26 their electricity and other forms of power from FEC. There is specific common law and case law on the
27 question of the competency of a member of a cooperative to serve as a juror on a case in which the co-op
is a litigant. In 69 ALR 3rd 1296, it is noted that the majority of courts that have considered the matter
follow the principle that "membership in a cooperative association renders a person incompetent to serve
as a juror where a ... cooperative is involved in the case." 69 ALR 3rd 1296, section 2a. This presumption
of inability to serve as a juror is implied from the individual's status as a member of the interested co-op,

1 and it is unnecessary to show that the prospective juror had any actual bias. FEC argues that in the
2 absence of authority from Montana, the holding from a case from North Dakota is dispositive. The Court
3 will address later the interpretation of the rule that this Court believes would be adopted by the Montana
Supreme Court. However, for the immediate issue, as noted in *Bremen*, supra, if public policy would
mitigate against applying the choice of forum clause, then the contract clause would be unenforceable,
and no principles of *res judicata* apply.

4 Second, under *Bremen*, supra, a forum selection clause may be held invalid for fraud or
5 overreaching. Here, in response to the Motion for Change of Venue, FEC contends that the forum
6 selection clause was agreed to in the course of drafting the Agreement. However, mere days after FEC
7 filed its first response to the motion for change of venue asserting that the parties agreed to the 11th
Judicial District Court as the choice of forum, ACG filed the affidavit of Hugh Boss, Document #136.
8 There, Mr. Boss specifically renounces the choice of forum provision, asserting that Ms. Hewitt, counsel
for FEC, unilaterally inserted that provision. Even though FEC filed a sur-response to the Motion for
9 Change of Venue, it did not offer any evidence to refute that affidavit. Thus, if the choice of forum
provision was not mutually agreed upon, the Court is not willing to disregard the possibility that the
exception articulated in *Bremen* applies.

10 Last, *res judicata* applies when the issue previously litigated is raised in subsequent litigation.
Here, the Court cannot say that the precise issue was presented to Judge Erickson on FEC's Motion to
11 Dismiss. As noted above, the question before Judge Erickson was whether the case should be heard by
a Montana district court or the federal court. The question whether a jury pool from Flathead County,
12 comprised of members of FEC, are competent to sit as jurors was not before Judge Erickson. Thus, the
principles of *res judicata* do not apply.

14 2. Forum Selection Clause in Agreement

15 As noted above, FEC argues that ACG agreed to the forum selection clause in the Agreement.
The affidavit of Hugh Boss, document # 136, sets out in great detail the steps by which Mr. Boss and Ms.
16 Hewitt exchanged letters and e-mails in order to draft the Agreement. Mr. Boss specifically denied that
he knew in advance, or that he agreed to, a provision placing exclusive venue in the 11th Judicial District
17 Court. It appears from the motion now before the Court that ACG is not seeking to disqualify the
undersigned from presiding over the case and trial, but is seeking a different jury pool. Once Mr. Boss
18 submitted his affidavit, FEC had the opportunity and obligation to present evidence that ACG agreed to
the forum selection clause, or knowingly waived any objection thereto. FEC has not done so, despite the
19 Sur-Response filed by it on August 11, 2005, as Document # 178. The Court rejects FEC's bald assertion
that ACG knowingly agreed to the forum selection clause.

21 3. Timeliness

22 On February 15, 2005, the Court entered an Order allowing ACG to file an amended complaint;
on that same date, FEC filed its amended answer, counterclaim and demand for jury trial. On March 7,
23 2005, ACG filed its answer to the amended counterclaim and on the same day, filed the Motion for
Change of Venue, raising the conflict now under consideration.

24 Statutorily, a motion for change of venue must be filed within 20 days of an answer or a reply to
25 an answer (such as a counter-claim.) Section 25-2-201, M.C.A., Rule 12(b)(iii), M.R.Civ.P. FEC argues
that, despite the fact that ACG filed the Motion for Change of Venue the same day it filed its response to
26 the Counterclaim, ACG is barred because it knew the Agreement contained the forum selection clause
and therefore knew all along that potential jurors were also members of the FEC. As noted above, the
27 Court considers the forum selection clause as unilaterally inserted, not mutually agreed upon. Thus,

1 looking only to the time frame in which the Motion to Change Venue was filed compared to filing the
2 Answer to the Counter-Claim, it is clear that ACG timely filed the Motion for Change of Venue.

3 4. Competency of Member of Cooperative to sit as Juror

4 ACG first argues that under Section 25-2-201, (2), M.C.A., it is mandatory that the Court change
5 the place of trial or obtain a jury from a different county. Statutorily,

6 ...the court or judge must, on motion, change the place of trial....

(2) when there is reason to believe that an impartial trial cannot be had therein;

7 ACG asserts that any potential juror who is a member of FEC has a financial interest in the
8 outcome of the lawsuit. ACG points to deposition testimony by a representative of FEC who stated that
9 almost 100% of the citizens of Flathead County are members of the cooperative. As FEC is the largest
and almost only supplier of electricity in Flathead County, the Court must assume that any potential juror
is a member of FEC unless established otherwise.

10 ACG relies on authority from 69 ALR 3rd 1296, for its position that any member of FEC is
11 incompetent to sit as a juror herein. The general rule is, just as a stockholder in a corporation is
12 disqualified from sitting as a juror in an action in which the corporation is a party or in which it has a direct
13 pecuniary interest, so too is a member of a cooperative association disqualified from serving as a juror
14 in a lawsuit in which the association is involved. The cases that have considered the issue and that have
15 ruled that a cooperative member is incompetent from serving on a jury have described rural electric
16 cooperative members as "both owners and customers [of the electric cooperative] and at once take the
17 place of the stockholders and customers of privately owned utilities..." *Ozark Border Electric Cooperative*
18 *v. Stacy*, 348 S.W. 2d 586 (1961, Mo. App.) Further, the North Carolina Court held that "...incompetency
19 of the juror must be conceded, because the juror was a member of the association and necessarily
20 interested in the litigation." *Peanut Growers' Exch. Inc., v. Bobbitt* (1924), 188 N.C. 335, 124 S.E. 625.
21 The courts have held that it was not necessary to explore the remoteness of the co-op owner's interest,
22 and that the "...members of an electric cooperative...were subject to *per se* disqualification from serving
23 as juror in the action; an inherent risk of impartiality would arise from allowing cooperative members to
24 serve as jurors, since they had a pecuniary interest in the action based on their status as both owners and
25 customers of the cooperative." *Alston v. Black River Electric Co-op* (2001), 345 S.C. 323, 548 S.E. 858.
26 In *Dean v. Group Health Cooperative* (1991), 62 Wn. App. 829, 816 P.2d 757, the issue of whether the
27 trial court erred in refusing a new trial based on error in jury selection turned on whether the jurors who
28 were also members of the defendant Group Health cooperative paid their own premiums and therefore
had a pecuniary interest in the group health cooperative so as to "qualify as impliedly biased". Washington
Revised Code Section 4.44.180(4), provides that a challenge for an implied bias may be stated for interest
on the part of the juror in the action. This is substantially similar to Montana's statute, Section 25-7-223,
M.C.A., which is set forth below, and provides for challenge for cause when the juror has an interest "in
the event of the action..." The only states in which the question has been resolved in favor of denying a
motion for change of venue where members of a co-op are potential jurors are North Dakota and
Mississippi.

FEC relies on Section 25-7-223(3)(a), M.C.A., for its argument that simply because the jury pool
will be its ratepayers is insufficient grounds for changing venue from Flathead County.

25-7-223 Challenges to jurors for cause

Challenges for cause may be taken on one or more of the following grounds:

(3) ... However, a challenge for cause may not be taken because of debtor and creditor

1 relation when the same arises solely:

2 (a) by reason of current bills of gas, water, electricity, or telephone; or

3 ...
4 (5) interest on the part of the juror in the event of the action or in the main question
5 involved in the action, except his interest as a member or citizen of a municipal
6 corporation;...

7 In an older case based in part on Section 93-5011, R.C.M.1947, a precursor to Section 25-
8 7-223, M.C.A., the Montana Supreme Court held that :

9 Where county brought an action for damages to [a] bridge, it was not an abuse of
10 discretion for the District Court to deny a motion for a change of venue even though the
11 jury was necessarily made up of taxpayers of that county each of whom had a pecuniary
12 interest averaging \$ 31.

13 *Carter County v. Cambrian Corp.*, (1963), 143 Mont. 193, 387 P.2d 904. FEC also contends that despite
14 the general authority that membership in a cooperative interested in the lawsuit automatically disqualifies
15 one from serving as a juror, the minority position, set forth in *Cassady v. Souris River Tel. Co-op.*, 520
16 N.W.2d 803, (N.D. 1994), is persuasive authority, and, under that case, actual bias must be proven on the
17 part of a prospective juror who is a member of a cooperative that is a litigant in the lawsuit.

18 Most cases interpreting Section 25-7-223(5), M.C.A., concern cases where taxpayers sit on a jury
19 in lawsuits involving the particular city or county; the leading case where taxpayers were allowed to sit as
20 jurors without automatic disqualification is *School District v. Globe & Republic Ins. Co.*, 142 Mont. 220, 383
21 P.2d 482. There, in a lawsuit by the local school district against its insurer for the insurer's failure to pay
22 for damage to a school building, the defendant insurer sought to change venue, based on its argument
23 that the jury pool was comprised almost exclusively of taxpayers, who were necessarily interested in the
24 outcome. In rejecting defendant's appeal of the Court's denial of the motion for change of venue, the
25 Supreme Court noted that the legislature provided in one statute that lawsuits against a county maybe
26 tried in that county, R.C.M. 1947, Section 93-2903 (now Section 25-2-126, M.C.A.) Further, the legislature
provided in another statute that qualified jurors are those registered voters in the county where the lawsuit
is filed. R.C.M.1947, Section 93-1301, subd. 4, (now Section 3-15-201, M. C.A.) The Court stated:

19 If the Legislature intended to require suits against a county to be brought in that county as
20 in section 93-2903, and then in the next breath, as in section 93-5011, subd. (5)
disqualified all jurors because taxpayers had an "interest" in the outcome, it would be a
strange and ridiculous result. It would, in effect, provide immunity against suit by a county.

21 However, there is no correlative statutory scheme to allow a stockholder to serve as a juror in a
22 lawsuit against the corporation in which he or she hold stock. As noted above, this is the analysis that is
employed by the various courts in considering the issue now before the Court - whether the members of
FEC are qualified to sit as jurors in this case.

23 The Court is satisfied that the Montana Supreme Court would adopt the majority rule as articulated
24 above, and determine that a member of an electrical cooperative that is a litigant in the lawsuit for which
the member is called as a prospective juror, is automatically disqualified. This rule is parallel to the rule
25 regarding corporate stockholders, which Montana law already addresses in Section 27-7-223, M.C.A.
There, the juror is considered interested in the outcome of the action, and is therefore excluded from
26 consideration as a juror; bias does not need to be established.

27 Intertwined with the argument regarding FEC members sitting as jurors is FEC's contention that

1 any allegation that an impartial jury cannot be found must be based on pre-trial publicity, and that such
2 pre-trial publicity must be inflammatory and create the impression that a fair trial cannot be had in the
3 original venue. ACG refers to *Mannix v. Butte Water Company and Washington* (1993), 259 Mont. 79,
4 854 P.2d 834, for its argument that "...where there is reasonable apprehension that a fair and impartial
5 trial cannot be held in the current venue..." a court must, upon motion, change the place of trial. In
6 *Mannix v. Butte Water*, supra, the defendant Butte Water Company and Dennis Washington raised four
7 reasons for a change of venue; the case was filed in the Second Judicial District, Silver Bow County, but
8 was tried in Flathead County after Judge Purcell granted the motion for change of venue. The reasons
9 are:

- 10 1) the residents of Silver Bow County had a potential interest in the outcome of [the] case,
11 and as ratepayers of Butte Water Company (B.C.) they were potential plaintiffs in a class-
12 action suit pending in Silver Bow County in which B.C. and Washington were named
13 defendants;
- 14 2) hostile public opinion had been aroused in Silver Bow County due to extensive media
15 reports and editorials so that prejudice existed in the minds of potential jurors;
- 16 3) the former presiding judge was the subject of articles and editorials suggesting that he
17 exercised favoritism;
- 18 4) counsel for plaintiffs in the class action suit were widely quoted in media as saying B.C.
19 was the 'alter ego' of Washington, and that Washington could be personally liable for the
20 acts and decisions of B.C..

21 Judge Purcell noted that the public at large seemed to have an opinion whether Mr. Mannix had
22 grounds for his lawsuit for wrongful discharge; the Judge also noted that an article in the Montana
23 Standard was unfair to both sides. The Supreme Court affirmed the order changing venue, noting first,
24 that absent an abuse of discretion, a trial court's ruling on a motion for change of venue will be upheld.
25 The Court also noted that not only did Judge Purcell base his ruling on the fact that the jurors, as
26 ratepayers, had an interest in the case, but that there was on-going negative media which, in his opinion,
27 rendered suspect the likelihood of a fair trial in Silver Bow County.

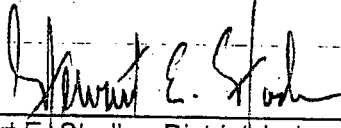
28 FEC argues that in *Mannix*, supra, there was long running adverse publicity; it argues that, here,
there has been no publicity regarding this lawsuit. It contends ACG has nothing in its exhibits that even
mentions the lawsuit. Therefore, argues FEC, the potential jury pool has not been contaminated.

In its Sur-Reply, ACG appends a recent Daily Interlake article, in which the media states the lawsuit
could "cost millions" to FEC. Understandably, there is no direct or indirect reference to insurance which
could mitigate any impact to the Cooperative and to its members. In that same article, Ms. Hewitt is
quoted in response to the Court's order, along with the comments by FEC's manager. In response, FEC
again urges the Court to deny the Motion for Change of Venue, contending that any media coverage must
be inflammatory and prejudice the public. It argues that these few news reports fail to rise to the level of
inflammatory and prejudicial. Last, FEC refers to a recent high profile criminal case, in which a motion to
change venue was denied. It argues that despite the frequent media reports, an impartial jury was found
and this Court refused to move the trial. FEC ignores the automatic disqualification of the cooperative
members, pursuant to Section 27-7-223, (5), M.C.A., for personal interest in the outcome of the case.
There was no showing in the criminal case that any potential juror had a personal or pecuniary interest
in the outcome of the trial. FEC's example is dissimilar and provides no authority.

The Court is satisfied, as stated earlier, that Montana should adopt the position that, like
stockholders of a corporation, members of an electrical cooperative are automatically disqualified from
being a juror in a lawsuit involving the electric cooperative. Here, where close to 100% (according to
FEC's representative) of the potential jury pool are members of the cooperative, who are thus deemed
disqualified from sitting as a juror. Second, while there may not be long-running, scurrilous press
regarding the lawsuit, the news article and the Cooperative's own newsletters portray the financial well-

1 being of the Cooperative as intertwined with that of the individual members. It is clear that any
2 Cooperative member is unable to serve, and it would be improper for the Court to manipulate the jury pool
3 in Flathead County to exclude all those who are co-op members. Plaintiff's Motion for Change of Venue
must be granted.

4 DATED this 22nd day of NOVEMBER, 2005.

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8 Stewart E. Stadler, District Judge
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c: Scott Sterns, Esq.
Shelton C. Williams, Esq.

D

1 WILLIAMS LAW FIRM, P.C.
2 SHELTON C. WILLIAMS, ESQ.
3 WILLIAM R. BIELER, ESQ.
4 235 E. PINE, P.O. BOX 9440
5 MISSOULA, MONTANA 59807-9440
6 Tel: (406) 721-4350 Fax: (406) 721-6037
7 *Attorneys for Defendant*

8
9
10 **MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY**

11 AMERICAN CAPITAL GROUP, LLC,

12 Plaintiff,

13 -vs-

14 FLATHEAD ELECTRIC COOPERATIVE,
15 INC.,

16 Defendant.

Stewart E. Stadler
CAUSE NO. DV 03-451(C)

AFFIDAVIT OF SHELTON C. WILLIAMS

17 STATE OF MONTANA)
18) ss:
19 COUNTY OF Missoula)

20 SHELTON C. WILLIAMS, being first duly sworn, upon oath
21 deposes and says:

22 1. Pursuant to M.C.A. § 3-1-805(1)(b), the undersigned
23 certifies that this affidavit is made in good faith. It is not
24 based on legal rulings from the Court that can be addressed in an
25 appeal.

26 2. I have reviewed Flathead Electric documents which show
27 that Judge Stadler is a member of Flathead Electric Cooperative,
28 Inc. I have not attached those documents in order to prevent
29 personal information from entering the public record. I will

1 provide a copy to the Court upon request.

2 **3.** Judge Stadler's findings in his November 22, 2005 Order
3 acknowledge a personal bias or prejudice which prevents him from
4 presiding over this case.

5 **4.** Judge Stadler has determined that members of Flathead
6 Electric are "necessarily interested in the litigation." (Order,
7 p. 4.)

8 **5.** Judge Stadler has also determined that members of
9 Flathead Electric have "an inherent risk of impartiality."
10 (Order, p. 4.)

11 **6.** Judge Stadler's Order demonstrates his belief that co-op
12 members are not qualified to judge the acts of the cooperative or
13 act as jurors in a case involving the co-op.

14 **7.** Judge Stadler's reasoning reflects his belief that, as a
15 member of the co-op, he is "necessarily interested in the
16 litigation," has "an inherent risk of impartiality," and is
17 likely "impliedly biased."

18 **8.** Based on these facts Judge Stadler is obligated to either
19 recuse himself under M.C.A. § 3-1-803 or be disqualified under
20 M.C.A. § 3-1-805.

21 **9.** Under § 3-1-803 a judge must not sit or act in any action
22 or proceeding in which he is interested. As set forth above,
23 Judge Stadler's own Order confirms that as a member of Flathead
24 Electric, he believes that he is necessarily interested.
25

1 WILLIAMS LAW FIRM, P.C.
2 SHELTON C. WILLIAMS, ESQ.
3 WILLIAM R. BIELER, ESQ.
4 235 E. PINE, P.O. BOX 9440
5 MISSOULA, MONTANA 59807-9440
6 Tel: (406) 721-4350 Fax: (406) 721-6037
7 *Attorneys for Defendant*

8 **MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY**

9 AMERICAN CAPITAL GROUP, LLC,

10 Plaintiff,

11 -vs-

12 FLATHEAD ELECTRIC COOPERATIVE,
13 INC.,


14 Defendant.

Stewart E. Stadler
CAUSE NO. DV 03-451(C)

CERTIFICATE OF COUNSEL

15 I, Shelton C. Williams, hereby certify that I am one of the
16 attorneys of record for Defendant in the above-entitled action. I
17 further certify that I have made the Affidavit (Exhibit D to
18 *Defendant Flathead Electric Cooperative's Request for Recusal, Alternative Motion to Disqualify*
19 *Judge Stadler, Request for Referral to the Montana Supreme Court, and Supporting Brief*) in
20 good faith and that to my knowledge and belief, the statements
21 set forth therein are true and correct.

22 DATED this 16th day of DECEMBER, 2005.

23 
24 _____
25 Shelton C. Williams